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IN THE

SUPREME COURT OF THE UNITED STATES

No. 748.

OCTOBER TERM, 1961.

LAVERNE W. SIMPSON ET AL.,
Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

BRIEF IN REPLY TO MOTION TO AFFIRM.

D. C. NOLAN,
Iowa City, Iowa,
WILLIAM N. DUNN,
Eldora, Iowa,
WILLIAM L. MEARDON,
Iowa City, Iowa,
Attorneys for Appellant.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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The Appellant, under Rule 16, Paragraph 3, files this Reply to Appellees' Motion to Affirm.

STATEMENT.

The facts and issues involved in this appeal are fully set out in Appellant's Jurisdictional Statement (J. St. 5-9); and the questions on which the decision depends are substantial (J. St. 9-17).

ARGUMENT.

This case involves the following *substantial questions*:

A. Can the Interstate Commerce Commission arbitrarily disregard the record evidence and decide a case solely upon an arbitrary basis;

B. Is a governmental agency immune from the application of the doctrine of estoppel, when not to apply it will result in the ruination of a man's business;

C. Does the issuance of a final certificate to a motor carrier by the Interstate Commerce Commission constitute a final determination of the carrier's rights or may such rights be re-examined and redetermined at the Will of the Commission;

D. May the Interstate Commerce Commission at any remote time redetermine a carrier's rights, and is the Interstate Commerce Act, which purports to grant such authority, unconstitutional as an improper delegation of legislative authority and a violation of the due process clause of the U. S. Constitution; and

E. Does the action of the Interstate Commerce Commission, when acting as both the prosecutor and judge constitute a denial of due process when its decision is based upon its decision in another case which case is in no way related in fact to the record evidence in the case involved?

ANSWERS TO APPELLEES' CONTENTIONS.

1. Appellees state, in substance, in their Motion to Dismiss, that the Commission's decision was not arbitrary because it followed its prior decision in *Carroll Trucking*

Company, Interpretation of Certificate, 62 M.C.C. 348, that "under established trade and industrial usage, the term 'structural' refers to a group of rolled steels identified as such regardless of their intended use or application", and that the Commission properly concluded in this case that "the term 'structural steel' as used in respondent's (Appellant's) certificates has a trade and industry meaning which does not embrace the iron and steel items enumerated in (its) findings". (J. St. 27A).

However, in reaching its conclusion the Commission made three (3) different decisions and determinations as to which items involved constituted "structural steel". (See 73 M.C.C. 75; 81 M.C.C. 78 and 84 M.C.C. 463). It is thus manifest that the Commission was not only uncertain as to what in fact constitutes "structural steel" but did, in its final decision, arbitrarily conclude, without regard for the record, that a limited number of items, being transported by Appellant, fell in that category. A complete absence of reference to the Record should be noted in the Commission's decision (See J. St. 19A-27A). The Commission is limited, in its determination of cases before it, by the record of the cases and the right of judicial review of its orders and decisions. See: *East Texas Lines* v. *Frozen Food Express*, 350 U.S. 48, 100 L. Ed. 917; *Interstate Commerce Commission* v. *Allen Krobl n, Inc.*, 348 U.S. 836, 99 L. Ed. 659. Standards or criteria promulgated by it, when contrary to the Record or when they pass the limits of reasonableness, are within the judicial power of review conferred by Congress. This is such a case.

The record evidence conclusively established that the steel items involved were "structural steel". The Record clearly demonstrates this fact and only from a review of the Record can the arbitrary character of the Commission's decision be determined. The *Carroll* case, *supra*, merely

established the principle that "structural steel" included steel channels intended for use in the manufacture of automotive lift trucks.

2. The contention that Appellant's recourse was to petition the Commission to re-open the *grandfather* proceedings for an interpretation of his certificates (citing *Andrew G. Nelson, Inc., v. United States*, 355 U.S. at 558-559) is without merit. The Commission's action (an investigation into the operations of Plaintiff [Appellant] to determine whether he was transporting unauthorized commodities * * * J. St. 3a-4a) did in fact constitute an interpretation of Appellant's operating authority because of the extended proceedings before the Commission, including the nature and extent of operations (*grandfather*) conducted by Appellant's predecessors (See footnote one (1) J. St. 5). Appellant presented to the Commiss on everything he could show or claim under his predecessor's *grandfather's* rights.

Any further action before the Commission would have been futile and fatal. It would have meant the cessation of operations by Appellant during such proceedings under the Commission's cease and desist directory. This case is distinguishable from the *Nelson* case, *supra*, in that, in that case, it does not appear that the evidence of *grandfather* operations were "brought to the Commission's attention".

3. Appellees' assertion that the doctrine of estoppel may not be invoked against the Government, or any agency thereof, is the general rule but not without its exceptions. *See cases cited in Appellant's Jurisdictional Statement, pages 11-12-13.*

In this case Appellant and his predecessors had on file with the Commission, for over 20 years, their tariffs setting forth in detail all of the commodities involved,

which was notice to the Commission, and to the world, the items and commodities being transported. Further, the Commission made or was required to make a full review of the scope of the certificates involved when they were transferred to Appellant. *Commission approval of such transfer being required under the Interstate Commerce Act, Part II*, 49 U.S.C.A. 312 (B). Appellant relied upon such approval and invested substantial sums in property and equipment in reliance thereon. (See footnotes two (2) page 5, J. St., and one (1) page 6, J. St.)

As against the claim that it would be "impractical" for the Commission to review such published and filed tariffs, to determine the extent and scope of a carrier's operations, even upon the required review on transfer of the certificates, we have, in this instance, the ruinous and irreparable consequences to Appellant if the Commission is not held to be estopped from revoking, by interpretation, his operating authority.

If the issuance of the certificate to Appellant, after formal review, as required by Part II of the Interstate Commerce Act, 49 U.S.C.A. 312 (B), did not establish Appellant's rights, then would there ever be an end? It is submitted that under *U. S. v. Seatrain Lines*, 329 U.S. 424, 91 L. Ed. 396; *U. S. v. Rock Island Motor Transit Co.*, 340 U.S. 417, 95 L. Ed. 391, the issuance of the certificates to Appellant to transport "structural steel" embraced all of the items which his predecessors had been hauling for many years and was *res judicata*.

4. Appellees' assertion that Appellant cannot raise the unconstitutionality of the Interstate Commerce Act, if it authorized the Commission to revoke, at will and at any remote time, Appellant's operating authority, for the first time in the lower Court, when such claim was not

made before the Commission, is the general rule but, again, there are exceptions and this case is one where the exception peculiarly applies. See *Baltimore & Ohio R. Co. v. United States*, 289 U.S. 347, 80 L. Ed. 1209.

What would it have availed Appellant to claim before the Commission that under the Interstate Commerce Act it did not have authority to limit Appellant's operating rights after many years of operation? The Commission was the Judge of its own acts, and would it have determined that it did not have authority to do what it did —we don't believe it would. This issue merits full argument before and consideration by this Court to avoid the harsh injustice which will befall Appellant if relief is not granted to him in this case.

CONCLUSION.

For these and the reasons set forth, in Appellant's Jurisdictional Statement, substantial questions are presented in this appeal and jurisdiction should be noted and the judgment of the District Court reversed.

Respectfully submitted,

D. C. NOLAN,
Iowa City, Iowa,
WILLIAM N. DUNN,
Eldora, Iowa,
WILLIAM L. MEARDON,
Iowa City, Iowa,
Attorneys for Appellant.

CERTIFICATE OF SERVICE.

I hereby certify that I have today served the foregoing Brief of the Appellant upon each of the parties and upon the Solicitor General of the United States pursuant to the requirements of Rule 33, by depositing copies thereof in envelopes in the United States Post Office with first class postage prepaid (air mail postage for parties outside the State of Iowa) addressed to the Solicitor General and to each of the following counsel of record for such parties:

Solicitor General of the United States, Department of Justice, Washington 25, D. C.;

Donald A. Wine, Esq., United States District Attorney, Southern District of Iowa, Room 202 Federal Court Bldg., Des Moines, Iowa;

Robert W. Ginnane, Esq., General Counsel, Interstate Commerce Commission, Washington 25, D. C.;

Francis A. Silver, Esq., Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

Dated this day of April, 1962.

D. C. NOLAN,
405 Iowa State Bank Building,
Iowa City, Iowa,
Attorney for Appellant.